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THE ROAD FROM NOWHERE? PUNITIVE DAMAGE RATIOS AFTER *BMW v. GORE* AND *STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. v. CAMPBELL*

Andrew C.W. Lund[1]

I. INTRODUCTION

Since at least 1996 when the Supreme Court decided *BMW of North America, Inc. v. Gore*,[2] lower courts' reviews of punitive damage awards have officially included a review of the ratio between the punitive award and the underlying compensatory award. Yet, this ratio's role in these courts' analyses has often been very weak. This was not necessarily a fault of *BMW*, which was merely grounded in a concern for fair notice to defendants. In *State Farm Mutual Automobile Insurance Co. v. Campbell*,[3] however, that rationale changed, and with that change, the weakness of ratios has become problematic.

In *BMW*, the Court reaffirmed that an excessive punitive damage award may violate due process and, for the first time, held that a punitive damage award's excessiveness violated due

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[2] 517 U.S. 559 (1996).

[3] 538 U.S. 408 (2003).

process.[4] Most famously, *BMW* set forth a non-exclusive list of three "guideposts" to direct courts in their determinations of unconstitutional excessiveness.[5] Among these three was the reasonableness of the ratio between a punitive damage award and the underlying compensatory award.[6] Indeed, much of the academic debate surrounding punitive damages, both before and after *BMW*, concerned such ratios.[7] But despite the fact that *BMW* described the ratio between punitive and compensatory awards as an important part of the analysis, later judicial review of such awards often overlooked or marginalized ratios.

This marginalization of ratios, far from being exogenous to *BMW*, was a product of certain provisos of the "guidepost" framework the case established for determining the unconstitutionality of punitive damage awards. These provisos left lower courts with the distinct impression that ratios between punitive and compensatory damages were to be of little help in determining excessiveness. Faced with these instructions, the ratio guidepost was doomed to fail with respect to constraining punitive

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[4] *See* Honda Motor Co. v. Oberg, 512 U.S. 415 (1994); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991); Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257 (1989).

[5] *See BMW*, 517 U.S. at 575.

[6] *Id.*

[7] *See, e.g.*, Theodore Eisenberg & Martin T. Wells, *The Predictability of Punitive Damages Awards in Published Opinions, the Impact of BMW v. Gore on Punitive Damage Awards, and Forecasting Which Punitive Awards Will Be Reduced*, 7 S. CT. ECON. REV. 59 (1999); Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421 (1998); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347 (2003).

awards.

Although the caveats often rendered ratios ineffective, that ineffectiveness was not inconsistent with *BMW*'s limited constitutional concern — fair notice to defendants. Justice Stevens' majority opinion in *BMW* declared: "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive *fair notice* not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."[8] But "fair notice" does not require mathematical certainty or anything close to it. Nor does it necessarily mean that a jury may not be arbitrary or capricious in reaching its decision. Such was ratio's happy, albeit ineffective, position after *BMW*.

The ineffectiveness of ratios only became problematic when *State Farm* modified its underlying rationale, espousing the more robust concept of "non-arbitrariness." That modification should have resulted in a stronger role for punitive-to-compensatory ratios, because the *BMW* guideposts, without a strong concern for ratio, did not necessarily constrain juries' arbitrariness. But *State Farm* failed to clearly break from those provisos in *BMW* that had undercut ratios' power. As a result, what had been merely an ineffective guidepost under *BMW* metastasized into an internally inconsistent doctrine under *State Farm*. Now, not only are lower courts after *State Farm* confused with respect to ratio's import, this confusion is, for the first time,

[8] *BMW*, 517 U.S. at 574 (emphasis added).

problematic *vis-à-vis* the underlying constitutional issue.

Part II offers a brief introduction to *BMW* and its immediate aftermath. After the decision was handed down in 1996, scholars found that punitive damage award ratios were still arbitrary. In Part III, one hypothesis given to explain this result — that not enough time had elapsed since *BMW* to allow lower courts to come to grips with its lessons — is examined and dismissed after observing how post-*BMW* courts continued to give shape to the guideposts well beyond 1996. Part IV offers a different hypothesis, which better explains why punitive damage awards behaved arbitrarily. The cause of ratios' weakness lay in the *BMW* guideposts themselves and in the Court's rationale of fair notice. Part V describes *State Farm* and its relationship to *BMW*. *State Farm* changed the Court's rationale for reviewing punitive damages. This new rationale demanded a stronger ratio guidepost, but *State Farm* did not formally distance itself from those parts of *BMW* that had rendered the ratio guidepost impotent. This has created a significant inconsistency in the Court's punitive damages doctrine. Nevertheless, lower courts appear to be making their way towards a more coherent punitive damages doctrine. In this way, the practical effect of the rationale "sea change" has been better realized than the jurisprudential one.

II. *BMW OF NORTH AMERICA, INC. v. GORE*

As noted, *BMW* announced that ratio was to play a role in determining excessiveness. The constraining nature of ratios led

many to posit that punitive damage awards would behave consistently after that decision. But scholars soon discovered inconsistency beyond that which had occurred pre-*BMW*. Ratio, a guidepost that should have constrained punitive awards was not necessarily doing its job and the other guideposts were helpless to impose consistency on punitive awards.

BMW

In 1990, Dr. Ira Gore bought a new BMW from a dealership in Alabama. He soon discovered that the car had been repainted prior to his purchase.[9] It had been BMW's policy to repair damaged-but-new cars and sell as "new" those cars whose repair costs were less than three percent of their total value.[10] Gore's damaged car had fallen into this group, and, consequently, BMW had sold the car to him without disclosing that it had been repainted.[11]

Dr. Gore brought suit and an Alabama jury returned a verdict in his favor for $4,000 representing the diminution in value due to the repainting.[12] The jury also awarded Dr. Gore $4 million in punitive damages, in light of all the damage caused throughout the United States by BMW's non-disclosure policy; Gore had contended at trial that BMW had similarly defrauded approximately 1,000 customers throughout the United States.[13]

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[9] *Id.* at 563.
[10] *Id.* at 563-64.
[11] *Id.* at 564.
[12] *Id.* at 565.
[13] *BMW*, 517 U.S. at 564.

BMW appealed the award and the Alabama Supreme Court ordered a remittitur of $2 million because the jury improperly considered BMW's acts of sale and non-disclosure in jurisdictions outside of Alabama.[14]

The United States Supreme Court held that even this reduced award was unconstitutionally excessive.[15] Justice Stevens' opinion identified the constitutional problem as the absence of notice to BMW of such a large punitive damage award,[16] while Justice Breyer, in his concurrence, specifically described the constitutional concern in terms of arbitrariness, that is, the absence of " 'reasonable constraints' within which [a jury's] 'discretion is exercised.' "[17] These two rationales are intertwined: any provision of notice as to how or to what extent punitive damages will be awarded, simply by so outlining the outer limits of punitive damage awards, will have some effect on curbing a jury's arbitrariness.

However, "fair notice" and "non-arbitrariness" are fundamentally different. They are respectively judged in relation to two different groups of actors. The purview of fair notice is

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[14] *Id.* at 567.

[15] *Id.* at 573-74. The Court agreed with the Alabama Supreme Court that the jury had improperly considered BMW's acts and omissions outside of Alabama. It held that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *Id.* at 572.

[16] *Id.* at 574-75 ("Three guideposts, each of which indicates that BMW *did not receive adequate notice* of the magnitude of the sanction that Alabama might impose . . . lead us to the conclusion that [the award was excessive].") (emphasis added).

[17] *Id.* at 587 (Breyer, J., concurring) (citing *Haslip*, 499 U.S. at 20-21).

limited to a particular defendant — he or she is the one harmed by the absence of such notice and his or her awareness of the punitive possibilities is the dispositive issue. An inquiry into non-arbitrariness, on the other hand, is directed toward the decision-maker, i.e., the jury. It is the jury's actions — its process — that matter, not necessarily the effect that process may or may not have on any defendant. According to Justice Breyer's concurrence, the harm in arbitrariness is more globalized in the sense that capricious awards damage respect for the legal system and not merely the wallet of a particular defendant.[18]

The practical difference between the two rationales lies in the extra requirement non-arbitrariness places on decision-makers. For example, a legislature might announce a range of possible punishments, thereby placing a defendant on fair notice of his or her liability. However, a rule of non-arbitrariness further requires that the decision-maker *reason* its way within that range. Fair notice, then, is often a by-product of non-arbitrariness, as non-arbitrary awards are more predictable. But fair notice is not sufficient by itself to provide for non-arbitrariness. Moreover, the measures which may ensure fair notice, perhaps the establishment of a range of possible awards, are not necessarily able to insure non-arbitrariness.

From the concept of fair notice flowed *BMW*'s three "guideposts" to direct excessiveness analyses. First, courts were to

[18] *BMW*, 517 U.S. at 587 (Breyer, J., concurring) (citing *Haslip*, 499 U.S. at 20-21).

consider the reprehensibility of a defendant's conduct.[19] On this count, *BMW* suggested punitive damages ought to "reflect 'the enormity of [the] offense.' "[20] The Court delineated a general continuum of reprehensibility, with non-violent, negligent acts at one end and violent, intentional acts at the other.[21] Later courts were to consider whether the harm caused was physical or economic; whether the plaintiff was financially vulnerable; whether the tortiuous acts were isolated or recurring; and whether the tort was intentional or accidental.[22] Of particular interest, *BMW* pronounced reprehensibility as "[p]erhaps the most important indicium of the reasonableness of a punitive damages award."[23]

The second *BMW* guidepost was the ratio of the punitive award to the compensatory award.[24] Specifically, the punitive award was to bear some reasonable relationship to the "harm likely to result from the defendant's conduct as well as the harm that actually has occurred."[25] *BMW* quickly cautioned, however, that no "simple mathematical formula" could determine whether a punitive award was constitutional.[26]

Finally, under the third guidepost, courts reviewing for excessiveness were to consider the "civil or criminal penalties that

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[19] *Id.* at 575.
[20] *Id.* (internal citation omitted).
[21] *Id.* at 575-76.
[22] *Id.* at 576.
[23] *BMW*, 517 U.S. at 575.
[24] *Id.* at 580-81.
[25] *Id.* at 581 (emphasis omitted).
[26] *Id.* at 582.

could be imposed for comparable misconduct."[27] Along this line, reviewing courts were to " 'accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue.' "[28]

The Aftermath

After *BMW*, scholars eagerly waited to see what effect the Court's first decision holding a punitive award to be unconstitutionally excessive would have on punitive awards in general. Professors Eisenberg and Wells conducted a study of punitive damage awards during the period between May 1995 and July 1997 (the *BMW* decision was handed down in May 1996).[29] They hypothesized that "punitive awards should be lower than before *BMW* and that the ratio of punitive awards to compensatory awards should have decreased."[30]

Surprisingly, Eisenberg and Wells found "no significant difference in the pattern of awards before and after *BMW* and no significant difference in the rate at which courts order a reduction in punitive damages awards."[31] As expected, they found "meaningful differences in the ratio of punitive to compensatory awards."[32] However, those differences occurred with respect to

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[27] *Id.* at 583.
[28] *BMW*, 517 U.S. at 583 (quoting Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part).
[29] *See* Eisenberg & Wells, *supra* note 7, at 63.
[30] Eisenberg & Wells, *supra* note 7, at 61.
[31] Eisenberg & Wells, *supra* note 7, at 61.
[32] Eisenberg & Wells, *supra* note 7, at 61.

low-ratio awards; post-*BMW*, high-ratio awards actually increased.[33] The punitive awards were shifting toward their respective ends of the ratio distribution — low ratios were getting lower and high ratios were getting higher. What could account for this polarization? Writing only one year after *BMW*,[34] Eisenberg and Wells later reasonably posited: "[I]t may be that not enough time has elapsed for *BMW* to exercise significant influence on the pattern of punitive awards."[35] As time has passed and courts continued to accord little power to ratios, that explanation has become less and less plausible.

If ratios played little or no constraining role in courts' decisions, it would not be surprising that Eisenberg and Wells found high ratios remaining high and ratios becoming polarized. Their hypothesized consistency of ratios depended upon ratios directing and constraining, to some extent, a court's ultimate decision. Left to their own devices, the first and third *BMW* guideposts were likely to cause exactly the phenomena that Eisenberg and Wells observed.[36]

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[33] Eisenberg & Wells, *supra* note 7, at 61.

[34] Theodore Eisenberg & Martin T. Wells, *Punitive Awards After BMW, a New Capping System, and the Reported Opinion Bias*, 1998 WIS. L. REV. 387 (1998). In this earlier post-*BMW* study, Eisenberg and Wells noted that the "universe of reported opinions . . . is systematically biased upwards." *Id.* at 409.

[35] Eisenberg & Wells, *supra* note 7, at 61.

[36] *See* Martin H. Redish & Andrew L. Mathews, *Why Punitive Damages are Unconstitutional*, 53 EMORY L.J. 1, 12 (2004) ("Because of the inherent vagueness of the criteria used to measure the constitutional validity of punitive damages awards, lower courts employing those criteria have permitted punitive damages awards that by most rational standards would likely be deemed dramatically excessive.") (footnotes omitted). Professor Redish and Mr. Mathews find *BMW*'s second guidepost to be inherently vague as well. They note that *State Farm*'s single-digit ratio was adopted as a "guiding rule of

If reprehensibility were the criterion on which excessiveness was determined, high ratios would likely remain high.[37] Juries give awards with high ratios in the first place when acts are particularly offensive; they give awards with low ratios when the acts are less so. When ratios are not taken into account, therefore, reprehensibility can *protect* the award and the corresponding punitive-to-compensatory ratio from judicial scrutiny driven by otherwise constraining considerations.[38]

Moreover, examination of comparable sanctions is hardly an effective control. Most importantly, the third guidepost offers little help in constraining punitive awards in cases where jail time might be available because of the incommensurability of economic sanctions and imprisonment.[39] So, for what are likely the most

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thumb" to combat the dramatically excessive punitive awards that had been allowed under *BMW*. *Id.* Their complaint with the single-digit rule of thumb is that such an arbitrary mathematical formula "underscores the quasi-legislative nature of the Court's constitutional doctrine." *Id.*

[37] *See, e.g.*, Steven L Chanenson & John Y. Gotanda, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze from the BMW/State Farm Guideposts*, 37 U. MICH. J.L. REFORM 441, 443 (2004) ("The first guidepost, concerning reprehensibility, remains amorphous. Because the Court did not provide a clear set of criteria to determine whether a defendant's conduct justifies a certain amount of punitive damages, applying this guidepost is highly subjective and can lead to inconsistent decisions."); Stephanie L. Nagel, *BMW v. Gore: The United States Supreme Court Overturns an Award of Punitive Damages as Violative of the Due Process Clause of the Constitution*, 71 TUL. L. REV. 1025, 1039 (1997) ("[T]he only predictable cases are those that land at the extremes of the reprehensibility scale.").

[38] *But see* Chanenson and Gotanda, *supra* note 37, at 470 (noting that reliance on ratios might also lead to inconsistent results because of the ease with which ratios can be manipulated, particularly with respect to potential harm).

[39] Chanenson and Gotanda, *supra* note 37, at 479-80 ("Comparing punitive damages awards to non-monetary criminal punishments . . . would effectively eviscerate the third guidepost because such punishments are not meaningfully comparable to monetary fines. . . . Any nontrivial potential term of imprisonment would likely justify almost any size punitive damages awards.").

egregious cases, the third guidepost does no work in constraining punitive damage awards.[40] Furthermore, courts rarely apply the third guidepost.[41] Finally, the Court itself has expressed concern over the propriety of applying the third guidepost. In *State Farm*, Justice Kennedy observed the disconnect between the standards of proof required in civil versus criminal cases and noted "[p]unitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award."[42]

In short, one should have expected that post-*BMW* ratios would behave according to Eisenberg and Wells' expectations, i.e. consistently, only if post-*BMW* courts were actually considering an award's ratio or some other similarly constraining factor in their analyses. But, as is discussed in the next section, lower courts were not using the ratio guidepost in that way.

III. THE SECOND GUIDEPOST BETWEEN *BMW* AND *STATE FARM*

In fact, courts were often not using the ratio guidepost in any meaningful way at all. Coupled with the weakly constraining

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[40] *But see* Chanenson and Gotanda, *supra* note 37, at 480-81 (contending that the third guidepost should only look to criminal fines, rather than all criminal punishments).

[41] *See, e.g.*, David Hogg, *Alabama Adopts De Novo Review for Punitive Damages Appeals: Another Landmark Decision or Much Ado About Nothing?*, 54 ALA. L. REV. 223, 232 (2002) (suggesting that resort to comparable sanctions would provide clarity with respect to excessiveness analyses).

[42] State Farm Mut. Auto. Ins. Co. v. Campbell, 583 U.S. 408, 428 (2003).

first and third guidepost (which, as discussed, was not being used very much either), the *BMW* framework was bound to produce arbitrary punitive awards. A search of August 1997-April 2003 cases found over 300 decisions in which courts reviewed punitive damage awards within the *BMW* framework.[43] In these cases, courts rather consistently found the ratio guidepost to be weak, i.e., they accorded the ratio guidepost little or no weight at all. More often than not, this discarding of ratios was based upon either the subordinate role ratios were required to play in excessiveness analyses or the futility that many courts believed necessarily characterized any analysis driven by such a mathematical tool.

At the outset, it is important to lay out what it means for a guidepost to be "weak" or "strong." In the extreme case, it is possible that a court might find one guidepost to be decisive. The court might determine that because of considerations of reprehensibility, ratio or comparable sanctions alone, a decision necessarily follows regarding the constitutionality of a punitive damage award. For instance, the first guidepost might be strong if, despite an apparently unreasonable ratio and no comparable sanctions, an award was upheld on the grounds that the act was so despicable as to merit extraordinary punishment.

A lesser version of one guidepost's strength would be the following example: Imagine a court basing its ruling on a

[43] These cases ranged from state appellate courts to federal district and appellate courts. At least one study found "no substantial evidence of significant differences in the treatment of the punitive-compensatory ratio by state and federal courts or by [federal] district courts, and [federal] courts of appeals." Eisenberg & Wells, *supra* note 34, at 410.

guidepost when it is not clear in which direction the others point. In the case of a moderately reprehensible act and a ratio that is on the border of reasonableness, the third guidepost might be strong if, on the ground that no similar sanctions existed in criminal or civil law, the court struck down an award as being unconstitutionally excessive.[44]

On the other hand, it would seem as though a guidepost was weak if a court recognized that it cut in favor of or against an award, but ruled in the opposite fashion. For example, imagine a court recognizing that a ratio was exceptionally high, but ruling the award constitutional because the defendant's reprehensibility was great and there existed comparable sanctions. It would be sensible to say that the second guidepost was weaker than the sum of the other two. Of course, the last example should strike most people as not necessarily valuing one guidepost less than any other. Instead, it may be that the sum of the other guideposts simply trumped the single.

Along this line, it might be the case that one guidepost trumps two others, leading to the conclusion that the two are relatively weak. But such a conclusion may be based on one guidepost so strongly pointing in one direction as to overcome the marginal guidance provided by the other two. Of course, this does not mean that the court has failed to ascribe equal importance to the other two guideposts. Instead, it merely indicates that the

[44] This is similar to the proposal of Chanenson and Gotanda. *See supra* note 37 and accompanying text.

guidance provided by the two guideposts, taken together, is not as strong as the single one in that particular case.

With this in mind, it is safe to say that the majority of post-*BMW* cases exemplified a trend among many courts to accord little or no weight to ratio. And, as mentioned, this lack of gravity was occasioned by two considerations.

In many cases, ratio explicitly played a subordinate role. For example, in *Rahn v. Junction City Foundry, Inc.*,[45] a federal district court in Kansas upheld a $30,000 punitive damage award.[46] It mentioned all three of the *BMW* guideposts, beginning with the first and the third.[47] After concluding that the defendant's acts were reprehensible and that comparable sanctions existed, the court ruled: "[d]efendant had fair notice that it could be exposed to punitive damages in the circumstances."[48] Conspicuously, it did not find that the defendant was also on notice as to the possible punitive to compensatory ratio. Instead, the court held, without further discussion and in a separate passage, that the ratio "[was] not unconstitutionally disproportionate."[49]

Rahn could not have been "disproportionate" because the defendant was aware that ratios might be that high.[50] As noted, the *Rahn* court never indicated that there were other cases that put the defendant on notice of a 30 to 1 ratio or that 30 to 1 was otherwise

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[45] 161 F. Supp. 2d 1219 (D. Kan. 2001).
[46] *Id.* at 1243.
[47] *Id.* at 1244.
[48] *Id.*
[49] *Id.* at 1245.
[50] *Rahn,* 161 F. Supp. 2d at 1244.

within the range of punitive damage liability likely to be expected by a defendant. Instead, the ratio was deemed "not unconstitutionally disproportionate" because the case was not one of "purely economic injury."[51] The determination on the point of reprehensibility (and perhaps comparable sanctions), that the injury went beyond the "economic," simply eviscerated the need to even examine the ratio.

Furthermore, in *Seitzinger v. Trans-Lux Corp.*, the New Mexico Supreme Court upheld a $400,000 punitive award (26 to 1 ratio) in a sexual harassment case.[52] First, the court held that the defendant's actions were reprehensible enough to warrant a significant punitive damage award.[53] It went on to simultaneously address the second and third BMW guideposts:

> Here the ratio is twenty-six to one. We generally agree the ratio is high. But, is it too high? [Defendant] notes that no New Mexico employment termination case has upheld a punitive damage ratio of this magnitude. [Defendant] also reminds us . . . that, "if the damages are significant and the injury not hard to detect, the ratio of punitive damages to the harm generally should not exceed ten to one." [Defendant]'s observations are accurate as far as they go, but they do not resolve the issue.[54]

The court continued by observing that the public policy against sexual harassment was so strong it could not "say as a

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[51] *Id.* at 1245.
[52] No. 20678, 2001 WL 1748893, at *12 (N.M. Ct. App. Nov. 30, 2001) (unpub'd).
[53] *Id.* at *11-12.
[54] *Id.* at *12.

matter of law that the ratio is too high."[55] Although the ratio was "high" and no comparable sanctions existed in case law, the court still refused to deem the award excessive.[56]

Such instances of reprehensibility defeating ratio were common. In *State Compensation Insurance Fund v. WPS, Inc.*,[57] a California court determined that the defendant's "willful[] perpetrat[ion of] a fraud on a company serving the public need of providing workers' compensation insurance" was reprehensible.[58] As for the second guidepost, the court ruled that "the ratio of 14 to 1 . . . is not excessive given the ongoing fraudulent conduct engaged in by WPS."[59] In *Wightman v. Consolidated Rail Corp.*,[60] the Ohio Supreme Court upheld a $15 million punitive damage award, an award 6,250 times greater than the compensatory award.[61] The disparity was not inappropriate, according to the court, "because a punitive damages award is more about a defendant's behavior than the plaintiff's loss."[62] Moreover, the actual damages had "little to do with how a jury

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[55] *Id.*

[56] *Id. See* Axen v. Am. Home Prod. Corp., 974 P.2d 224, 243 (Or. Ct. App. 1999) (stating that the state had a strong interest in preventing catastrophe, though the risk of such an event was low).

[57] B116419, 2001 Cal. App. Unpub. LEXIS 2458, at *1 (Cal. Ct. App. Oct. 22, 2001) (unpub'd).

[58] *Id.* at *50.

[59] *Id.* Briefly discussing the third guidepost, the court found that WPS was on notice of the possibility of the punitive damage award because "fraud has been a predicate for imposing punitive damages since . . . 1872!" *Id.* The court ignored the idea, enunciated in *BMW*, that it is notice concerning the *amount* of punitive damages that drives the constitutional analysis.

[60] 715 N.E.2d 546 (Ohio 1999).

[61] *Id.* at 551-52.

[62] *Id.* at 553.

might effectively and fairly punish and deter Conrail's conduct."[63] In both cases, ratios could hardly have been more meaningless. Indeed, *Wightman* came close to saying just that when it candidly announced: "We see the ratio between the compensatory and punitive damages as less relevant here because of the egregiousness of the act."[64]

The elevation of reprehensibility to a position above ratio was not the only problem for the ratio guidepost. The impossibility of mathematical certainty with respect to what was a permissible or impermissible ratio also drove courts to simply disregard ratios entirely. In *Daka, Inc. v. Breiner*,[65] the District of Columbia Circuit Court of Appeals upheld a $390,000 punitive award, an award 39 times the compensatory award. The court admitted that such a ratio might give cause for suspicion. The court reasoned "the Supreme Court in *TXO* upheld an award of $19,000 in compensatory damages and $10 million in punitive damages, a ratio of more than five hundred to one. . . . In [*BMW*], on the other hand, the Court reversed . . . a ratio of five hundred to one."[66] When read together, *Daka* said, these cases reaffirmed that no mathematical bright line exists that fits every case.[67] That is the last reference to ratio made in the opinion. The futility of finding a bright line apparently meant that ratio contributes nothing to the excessiveness analysis.

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[63] *Id.*
[64] *Id.* at 554.
[65] 711 A.2d 86 (D.C. Cir. 1998).
[66] *Id.* at 101.
[67] *Id.*

The Sixth Circuit offered a prime example of this futility-driven position. In *Jeffries v. Wal-Mart,*[68] the court upheld a 50 to 1 ratio between compensatory and punitive awards. The court did not discuss the first or third guideposts, but did explain its interpretation of the second guidepost. The court cited *BMW* for the proposition that a high ratio, even 500 to 1 will not, by itself, offend constitutional due process.[69] What force a 50 to 1 or 500 to 1 ratio might have upon the analysis was left unclear, as the court succinctly announced "Wal-Mart's argument has failed to convince us."[70]

Judge Bell, in his dissent, addressed each of the guideposts. He wrote that the defendant's actions were not so reprehensible as to warrant a $425,000 punitive award.[71] After comparing the punitive award to the "actual [] damages suffered by the plaintiff plus the harm likely to result from defendant's action," Bell found nothing to indicate a reasonable relationship.[72] In addition, there were no criminal sanctions for the defendant's conduct and punitive damage awards for retaliatory discharge actions were capped at the level of $300,000 by Congress.[73]

Jefferies, then, is an example of the ratio guidepost's weakness to the extent that ratio was unable to have any effect on

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[68] 15 Fed. Appx. 252 (6th Cir. 2000) (unpub'd).
[69] *Id.* at 266.
[70] *Id.*
[71] *Id.* at 267 (Bell, J., dissenting).
[72] *Id.* at 270.
[73] *Jeffries*, 15 Fed Appx. at 270 (Bell, J., dissenting) (citing 42 U.S.C. § 198a(b)).

what was apparently a blank slate. Given a relatively high ratio, the majority did not feel compelled to strike the award down. However, the court did not refute the claim that the ratio was high. stating only that a high ratio by itself would not offend due process, and when the "ratio is a breathtaking 500 to 1 . . . the award must surely 'raise a suspicious judicial eyebrow.' "[74] This implied that one or both of the other guideposts counseled upholding the award. But, as described in Bell's dissent, *Jefferies* would appear to be a case where the first and third guideposts were, in the majority's mind, neutral. And in the absence of direction from the other guideposts, the court could not conclude that a 50 to 1 ratio was dispositive. Absent such direction, one is left to wonder what import a ratio could possibly have.

Courts also fail to take the second guidepost seriously even when overturning punitive damage awards or ordering remittitur. In *Fall v. Indiana University Board of Trustees*,[75] the court noted the futility of using ratio more bluntly when remitting a punitive award that was 155 times the amount of the compensatory award. The court noted: "The rather fact-specific nature of the ratio guidepost appears to limit this factor's importance in reviewing the excessiveness of a damage award."[76] The ratio guidepost had been rendered utterly impotent by the fact that no bright line existed.

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[74] *Id.* at 266 (quoting *BMW*, 517 U.S. at 583) (internal citations omitted).
[75] 33 F. Supp. 2d 729 (N.D. Ind. 1998).
[76] *Id.* at 746. *See* Progressive Motors v. Frazier, 220 B.R. 476 (Bankr. D. Utah 1998). *BMW*'s rejection of a categorical approach led to the conclusion that "there is no set rule on the amount of punitive damages that may be imposed." *Id.* at 479.

Not only were extreme ratios unimportant to courts, but an apparently reasonable ratio did little to save punitive damage awards. In *2660 Woodley Road Joint Venture v. ITT Sheraton*,[77] a federal trial court in Delaware reduced a punitive damage award of $37.5 million notwithstanding the fact that it was only three times the compensatory award. The court found that the defendants' actions were not so reprehensible as to warrant the large punitive damage award.[78] On the other hand, with respect to the third guidepost, the court found that the defendants had "notice that their questionable conduct could result in the imposition of a substantial financial penalty."[79] Finally, the court addressed the 3 to 1 ratio: "the proper inquiry for considering the reasonableness of the ratio between compensatory and punitive damages is 'whether there is a reasonable relationship between the punitive damages and the harm likely to result from the defendant's conduct as well as the harm that actually occurred.' "[80] In deciding whether the ratio was reasonable, the court shifted its focus to the fact that deterrence was unnecessary in the defendant's case.[81] The result in *2660 Woodley Road* — that a 3 to 1 ratio was unreasonable — seems, at

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[77] No. 97-450-JJF, 2002 U.S. Dist. LEXIS 439, at *1 (D. Del. January 10, 2002).
[78] *Id.* at *20.
[79] *Id.* at *26. The court based this finding on the fact that defendants realized a profit of over $68 million from the contract upon which the fraud action was based. *Id.*
[80] *Id.* at *22-23 (quoting *BMW*, 517 U.S. at 581).
[81] *Id.* at *23-24 ("Further, in the Court's view, a reduced punitive damages award would still serve a deterrent function while comporting more with the boundaries of punishment warranted by the conduct in this case.").

the very least, a strange result given that other ratios far in excess of treble damages have been upheld.[82]

In all of these cases of weak ratios it is difficult to imagine courts ruling differently had the ratios been more extreme, or, in the cases like *2660 Woodley Road*, less so. The reasonableness of the ratio was of little or no importance to the ultimate resolution of the excessiveness inquiry. Whether it was because other considerations were more important or because there was simply no workable way of applying the ratio guidepost, a third of *BMW*'s analysis was often being disregarded.[83]

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[82] *See also* Gray v. Tyson Foods, Inc., 46 F. Supp. 2d 948, 959 (W.D. Mo. 1999) (stating that an award which corresponded to a 5 to 1 ratio was excessive, while one that resulted in a 2 to 1 ratio was not).

[83] There was a minority of cases in which the ratio guidepost was strong. *See, e.g.*, Rubinstein v. Adm'rs Tulane Educ. Fund, 218 F.3d 392, 408 (5th Cir. 2000) ("Having found that the award fails to satisfy the second requirement, we need not examine the third prong of the *BMW* test."); Murray v. Solidarity Labor Org. Int'l Union Benefit Fund, 172 F. Supp. 2d 1134, 1153 (N.D. Iowa 2001); Acceptance Ins. Co. v. Brown, 832 So. 2d 1, 24 (Ala. 2001) ("In light of the fact that Brown's total compensatory damages amount to no more than $60,000, we conclude that her punitive damages should amount to no more than $180,000."); Kent v. White, 559 S.E.2d 731, 739 (Ga. Ct. App. 2002), stating:

> When the ratio of 13.58 to 1 of [defendant]'s actual damages to punitive damages is compared to the punitive damages average ratios for other individuals, such ratio is much lower at 4.67 to 1. But when [defendant]'s ratio is compared to the corporate average of 12.6, [it] even exceeds the corporate average. Thus, the punitive damages returned against [defendant] under a *Gore* analysis are grossly excessive punishment . . . .

Notrica v. State Comp. Ins. Fund, 83 Cal. Rptr. 2d 89, 118 (Cal. Ct. App. 1999) (ordering a new trial on punitive damages unless the plaintiff agreed to a reduction of the award, so that the punitive-to-compensatory ratio would be approximately 10 to 1; and therefore, within a presumptively constitutional range).

IV. THE ROOT OF THE PROBLEM — THE ROAD TO NOWHERE

These cases, some decided well after the Eisenberg and Wells' study, point to a more systematic cause of the phenomenon they had discovered. The cause of the ratio guidepost's weakness lay in *BMW* itself. Along this line, Justice Scalia wrote a stinging dissent in *BMW*.[84] In it, he challenged a number of the majority's conclusions. Most importantly for the issue at hand, he suggested that the guideposts "mark a road to nowhere; they provide no real guidance at all."[85] In particular, Justice Scalia complained that "[t]he Court has constructed a framework that does not genuinely constrain, that does not inform . . . lower courts."[86] While perhaps a road to nowhere, the guideposts were unable to constrain punitive damage awards because they were not designed to constrain. In this way, *BMW* was not wrongly decided, nor was the framework it created not up to the challenge. In fact, the framework was up to the challenge — the absence of fair notice to defendants — but that challenge simply did not require much constraint.

It should have been no surprise that the ratio guidepost failed to "genuinely constrain" awards, as *BMW* had specifically instructed courts to place significant weight on reprehensibility as the "most important" guidepost.[87] This sapped the ratio guidepost

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[84] *BMW*, 517 U.S. at 598 (Scalia, J., dissenting).
[85] *Id.* at 605.
[86] *Id.* at 606.
[87] *Id.* at 575.

of its ability to guide anything at all — courts simply "turned off the road" after passing reprehensibility. Moreover, a reasonable reading of *BMW*'s confusing rejection of bright-line tests led lower courts to undervalue the ratio guidepost in other cases. That is, even if courts got past reprehensibility to consider ratio, the latter was often deemed a non-starter for determining excessiveness. Thus, any constraining power that ratios may have had was undercut by these two caveats.

These two provisos, though, were not inconsistent with *BMW* insofar as the majority was primarily concerned with fair notice. Reliance on reprehensibility arguably achieved fair notice and no bright mathematical lines were needed to let defendants know that they could be on a rather large punitive hook for egregious acts. Thus, the resulting impotence of the ratio guidepost detailed above was not inconsistent with the rationale underlying *BMW*.

The Primacy of Reprehensibility

When *BMW* announced the three guideposts, each appeared to be an equal partner in determining excessiveness:

> Three guideposts, each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose . . . lead us to the conclusion that the $2 million award against BMW is grossly excessive: the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered . . . and [the] punitive damage award; and the difference between this remedy and the civil

> penalties authorized or imposed in comparable cases.[88]

The opinion continued by noting that ratio was "perhaps [the] most commonly cited indicium of an unreasonable or excessive punitive damages award," and had "a long pedigree."[89] The majority noted: "Our decisions . . . endorsed the proposition that a comparison between the compensatory award and the punitive award is significant."[90] *BMW* went so far as to note, referring to *Pacific Life Insurance Co. v. Haslip*, that a 4 to 1 ratio was "close to" but did not " 'cross the line into constitutional impropriety.' "[91]

However, the majority also confusingly elevated reprehensibility above the other guideposts by naming it the "most important indicium of excessiveness."[92] Lower courts needed to account for this instruction as to reprehensibility's primacy. The Court did not give any indication, however, as to how much more important, *vis-à-vis* the other two guideposts, this "most important" one was to be. Because the Court's only statement on the issue was that reprehensibility was generally more important than the other two, any decision based on the extremity of a high ratio or the absence of comparable sanctions risked remand that such court had not heeded *BMW*'s instruction. This is not to say that *BMW* explicitly forced ratios or comparable sanctions to be disregarded.

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[88] *Id.* at 574-75.
[89] *BMW*, 517 U.S. at 580.
[90] *Id.* at 581.
[91] *Id.* (quoting *Haslip*, 499 U.S. at 23-24).
[92] *Id.* at 575.

Certainly, later courts were not clearly or obviously bound to allow reprehensibility to run roughshod over those guideposts. Nevertheless, given the lack of direction from the Court, it was not surprising that they often did.

Therefore, *BMW* was arguably being followed rather than distorted in each case described in Part III where reprehensibility overwhelmed ratio. Of course, the notion of reprehensibility's importance had been developed by the Court over time and was not created by *BMW*.[93] But because *BMW* purported to establish a tripartite framework, the primacy of reprehensibility turned out to be, at the very least, problematic with respect to the application of all three guideposts.

Moreover, there is reason to be concerned that reprehensibility, standing apart from the other guideposts, does not do much to constrain punitive awards. In his *BMW* concurrence, Justice Breyer cautioned against the possibility of courts "mak[ing] 'reprehensibility' a concept without constraining force, i.e., to deprive the concept of its constraining power to protect against serious and capricious deprivations."[94] First, a jury's determination of a defendant's reprehensibility is notoriously difficult for an appellate court to review.[95] Moreover, the punitive damage analog

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[93] *Id.* at 575-76 (citing cases).

[94] *BMW*, 517 U.S. at 590 (Breyer, J., concurring). A defendant's wealth "cannot make up for the failure of other factors, such as 'reprehensibility,' to constrain significantly an award that purports to punish a defendant's conduct." *Id.* at 591.

[95] *See* Chanenson & Gotanda, *supra* note 37, at 467 n.165 and accompanying text.

of any particular level of reprehensibility is extremely murky.[96] That is, even if a court can effectively review whether an act is slightly or outrageously reprehensible, that determination's import for computing punitive damage awards is unclear. Is there no limit on the punitive damages available in the case of the outrageously reprehensible act? Even when *BMW* established something of a sliding scale of *reprehensibility*, it did not address this issue of *commensurability*.

Ratios as Futile

Even had *BMW* said nothing about the relative importance of reprehensibility or ratio, it still qualified prospective application of the ratio guidepost so as to render it impotent. After describing the importance of ratios, the opinion immediately stated: "Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award."[97] The Court then specified that:

> [L]ow awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. . . . Higher ratios may also be justified in cases in which the . . . non-economic harm might have been difficult to determine.[98]

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[96] *See, e.g.*, CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 217 (2002).
[97] *BMW*, 517 U.S. at 582 (citations omitted).
[98] *Id.*

The conclusion to the Court's ratio discussion quoted *Haslip*'s directive that " '[w]e need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.' "[99]

The first reason for rejecting a bright-line mathematical test seems clear. The guidepost framework does not contemplate a ratio as dispositive between the "constitutionally acceptable" and the "constitutionally unacceptable." This kind of inter-guidepost dominance would obviate the need for reprehensibility and comparable sanctions. Not only does such a dominant guidepost appear inappropriate in light of the *BMW* framework, but to the extent one guidepost was intended to become dominant, it was reprehensibility and not ratio.

The turn away from ratio's dominance should hardly have necessitated its irrelevance, though. Requiring an award's ratio to be only one of three factors in determining the ultimate question of unconstitutional excessiveness does not require a court to abstain from passing judgment on a ratio's reasonableness. In this way, a 100 to 1 ratio might be unreasonable, but, at the same time, the other guideposts may strongly point toward an award's constitutionality.

Accordingly, a court should not treat the unreasonable ratio as being dispositive of the constitutional issue. Along this line, it makes sense to restrain ratio's power in those instances where its probity is minimal, as in the cases where non-economic harm was

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[99] *Id.* at 582-83 (quoting *Haslip*, 499 U.S. at 18).

significant or where actual damages were low.[100] For instance, it makes little sense to allow a corporation to avoid high punitive damages by simply practicing discrimination against poorly paid employees so as to cause only minor actual damages. The problem with bright lines is not with mathematical exactitude in respect to the isolated ratio guidepost, but rather, mathematical exactitude in respect to the full excessiveness inquiry.

Yet, as discussed in Part III, some courts interpreted *BMW*'s rejection of bright lines as a statement of doubt concerning the utility of ratios generally. *Fall v. Indiana University Board of Trustees* made this point most clearly when it stated the "fact-specific nature of the ratio guidepost appears to limit this factor's importance in reviewing the excessiveness of a damage award."[101] This interpretation had merit. As noted, *BMW* was concerned with the ability of ratio to dominate the other guideposts: "low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages."[102] Ratio does not necessarily control when reprehensibility points in the other direction — a point consistent with the discussion up to now. Nothing about that line from the Court's opinion should have rendered ratios meaningless.

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[100] Some courts have read these caveats to a very broad degree. In Romano v. U-Haul Int'l, 233 F.3d 655, 673 (1st Cir. 2000), the First Circuit upheld a 19 to 1 ratio because actual damages were "low"; actual damages in that case were $15,000.

[101] 33 F. Supp. 2d 729, 746 (N.D. Ind. 1998).

[102] *BMW*, 517 U.S. at 582.

However, *BMW* then noted: "A higher ratio may also be justified in cases in which the . . . non-economic harm might have been difficult to determine,"[103] rather than explicitly limiting ratio's power to overwhelm considerations of reprehensibility. This may be interpreted as an attack on the utility of ratios themselves. Irrespective of how reprehensible an act was or whether there were comparable sanctions available, this line from the opinion raised questions as to whether a court could ever be confident that a ratio between punitive and compensatory damages is good evidence as to excessiveness, rather than a concern about the interplay between ratio and the other guideposts. This concern strikes at the ratio guidepost independently — how confident can a court be that the compensatory damages it is using are the appropriate comparison?

This variability of what constitutes a "reasonable ratio" is the best argument for the futility to which cases like *Fall* referred. Such an argument does not mistake the restriction on the role ratios were to play in determining excessiveness with doubt about the possibility of determining whether a ratio is unreasonable in the first place. However, even this more reasonable interpretation is problematic. *BMW* only offered one example of when a ratio's reasonableness might vary — the case of hard-to-evaluate non-economic damages.[104] While certainly a broad caveat in a world where non-economic damages are frequently claimed by plaintiffs, the doubt about the reasonableness of ratios in such cases should

[103] *Id.*
[104] *Id.*

only go so far as the non-economic damages are difficult to measure. What is less clear is whether there are other cases in which a higher ratio may be justified. Nevertheless, and as the relative complexity of the preceding discussion shows, it should not have been surprising that some lower courts essentially read the second guidepost out of *BMW* based on the impossibility of evaluating the reasonableness of a ratio.

Arbitrariness versus Fair Notice

One could conclude that *BMW* and the impotent ratio guidepost it created might have succeeded at achieving its stated goal of placing defendants on fair notice of punitive liability; at the very least, the marginalization of ratios did not necessarily undermine fair notice. If the primacy of reprehensibility and the rejection of mathematical bright lines found in *BMW* directly led to the marginalization of ratio in later cases, these concepts themselves reflected the limited nature of *BMW*'s due process concern. As noted, the rationale behind *BMW* turned on the need for fair notice[105] — a goal relatively easy to achieve. To take the extreme case, the government's announcement that punitive damages are unlimited would arguably provide fair notice to defendants to avoid committing horrific torts. A criterion like

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[105] *See id.* at 574. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id.* "None of these statutes would provide an out-of-state distributor with fair notice that the first violation . . . of its provisions might subject an offender to a multimillion dollar penalty." *Id.* at 584.

reprehensibility, one certainly not marginalized by *BMW*, provides a sufficient amount in the way of notice. Putative tortfeasors are placed on notice that their punitive damage liability will be measured against a jury's opinion of their acts' egregiousness. Moreover, it is fairly certain that fair notice does not require mathematical exactitude. In this way, those aspects in *BMW* that often caused ratios to drop out of the excessiveness equation were not necessarily contrary to the concept of fair notice.

If fair notice, as a rationale, can take or leave ratios as an indicium of excessiveness, non-arbitrariness does not have that luxury. For non-arbitrariness as a constitutional concern, one need look no further than Justice Breyer's concurrence in *BMW*, in which he observed that the actual concern giving rise to constitutional limitations on punitive damage award amounts was the caprice of the decision-maker. Describing the need for constitutional oversight, he said:

> The reason [for such review] flows from the Court's emphasis in *Haslip* upon the constitutional importance of legal standards that provide "reasonable constraints" within which "discretion is exercised," that assure "meaningful and adequate review by the trial court whenever a jury has fixed the punitive damages," and permit "appellate review [that] makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose . . . ."[106]

[106] *Id.* at 587 (Breyer, J., concurring) (quoting *Haslip,* 499 U.S. at 20-21).

According to Justice Breyer, the guideposts must ultimately be able to function as "standards" and "constraints" on a jury's decision-making.[107] He distinguished this basis from mere fair notice: "Requiring the application of law, rather than a decisionmaker's caprice, *does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself.*"[108]

While "fair notice" might be satisfied through putative defendants imagining a prospective jury's view of their reprehensibility, reprehensibility alone does not provide the constraint necessary to "assure the uniform treatment of similarly situated persons" so crucial to Justice Breyer's mind.[109] The determination of reprehensibility is ultimately a subjective one, particularly insusceptible of principled judicial review.[110] As a result, reprehensibility could not remain the most important guidepost once the underlying rationale shifted to non-arbitrariness.

On the other hand, a strong ratio guidepost is not necessarily required by non-arbitrariness. Principled decision-

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[107] *BMW*, 517 U.S. at 588 (Breyer, J., concurring).
[108] *Id.* at 587 (emphasis added).
[109] *Id.* According to Justice Breyer, for the Alabama Supreme Court to find that there existed a reasonable relationship between $56,000 in actual damages and $2 million in punitive damages — when the harm was economic and there existed no evidence of continuing conduct — "is to empty the 'reasonable relationship' test of meaningful content." *Id.* at 590. That conclusion would seem equally applicable in light of the cases discussed in Part III.
[110] *Id.* at 580-81.

making may be occasioned by any number of criteria. Nevertheless, a bright mathematical line certainly constrains in the fashion described by Justice Breyer. In particular, a bright line goes further than most in assuring uniform general treatment of similarly situated people.

The Court returned to punitive damages generally, and the fair notice/non-arbitrariness distinction specifically, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*[111] There, the Court held that appellate review of excessive punitive damage awards was to be conducted *de novo*.[112] In explaining why that standard of review was appropriate, Justice Stevens, again writing the majority opinion, touched on a number of considerations, including the relative institutional competencies of trial and appellate courts.[113] But more importantly, he expanded the rationale for constitutional limitations on punitive damage awards. *Cooper Industries* specifically cited to the passage in Justice Breyer's *BMW* concurrence distinguishing between " 'simply provid[ing] citizens notice of what actions may subject them to punishment [and] . . . assur[ing] the uniform treatment of similarly situated persons.' "[114]

After *Cooper Industries*, non-arbitrariness, not fair notice, was the driving force behind review of punitive damage awards. It was non-arbitrariness that had been missing from *BMW*, in which the majority's reliance on fair notice had allowed the ratio

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[111] 532 U.S. 424 (2001).
[112] *Id.* at 431.
[113] *Id.* at 440.
[114] *Id.* at 436 (quoting *BMW*, 517 U.S. at 587 (Breyer, J., concurring)).

guidepost to be undercut. Requiring non-arbitrariness by requiring "standards" and "constraints" necessarily weakened reprehensibility's position as the "most important indicium" because reprehensibility, more than either of the other guideposts, allowed room for subjectivity and jury arbitrariness.

Ratio, on the other hand, was less susceptible to fall sway to a jury's caprice.[115] Though nuanced and fact-specific, ratio allowed perhaps the most objective criterion among the three guideposts for determining excessiveness. While the determination of what is and what is not an appropriate ratio is obviously arbitrary at the policy-making level,[116] the ratio guidepost's ability to be mathematically well defined in application became an advantage when the Court's focus shifted from fair notice to non-arbitrariness.

V. *STATE FARM MUTUAL INSURANCE CO. v. CAMPBELL*

After *Cooper Industries*, and considering the post-*BMW* tendency by lower courts to accord little weight to ratios, the ground was fertile for a substantial restatement of the Court's punitive damages doctrine. This restatement would be made in *State Farm*. The decision was grounded in the due process concern for non-arbitrariness and, because of that re-evaluation,

[115] *But see* Chanenson & Gotanda, *supra* note 37, at 443 (noting that ratios may be manipulated).
[116] *See, e.g.*, Redish & Mathews, *supra* note 36, at 12.

should have substantially changed *BMW*'s lessons about both the primacy of reprehensibility and the impossibility of mathematical bright lines. Instead, *State Farm* equivocated between parroting *BMW*'s discussion of both provisos and an implicit restatement of them. Lower courts faced with this conflict since *State Farm* appear to be surprisingly capable of utilizing the ratio guidepost.

The Decision

In 1981, Curtis Campbell tried to pass six vans on a two-lane highway in Utah.[117] In the process, he forced Todd Ospital, a driver in the opposite lane, to veer off the road in order to avoid a collision.[118] Ospital lost control of the vehicle and struck another vehicle operated by Robert Slusher.[119] Ospital was killed and Slusher was permanently disabled; Curtis Campbell and his wife Inez were uninjured.[120] Ospital's estate and Slusher sued Campbell. Campbell's insurance company, State Farm, contested liability, and declined to settle with both parties for $25,000 each, which was the policy's limit.[121] State Farm assured the Campbells that "their assets were safe, that they had no liability for the accident . . . and that they did not need to procure separate counsel."[122] At the subsequent trial, the Campbells' liability was assessed at approximately $186,000; State Farm initially refused to

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[117] State Farm Mut. Ins. Co. v. Campbell, 583 U.S. 408, 412 (2003).
[118] *Id.*
[119] *Id.* at 413.
[120] *Id.*
[121] *Id.*
[122] *State Farm*, 583 U.S. at 413 (citation omitted).

pay the $136,000 difference between the judgment and the policy's $50,000 maximum.[123] The Campbells retained their own counsel and appealed the verdict.[124] During the appeal, the Campbells, Ospital's estate and Slusher reached a settlement pursuant to which the plaintiffs would not pursue their claims against the Campbells personally and the Campbells would pursue a bad faith action against State Farm, from which the majority of the proceeds would go to Ospital's estate and Slusher.[125] The Utah Supreme Court denied the Campbells' appeal of the action,[126] and State Farm paid the whole judgment, including the amount over the Campbells' policy limits.[127]

The Campbells then brought suit against State Farm alleging bad faith, fraud and intentional infliction of emotional distress.[128] State Farm contended its decision not to settle had been an "honest mistake," but the Campbells introduced evidence demonstrating the decision was part of a nationwide practice by State Farm to cap insurance payouts.[129] The jury awarded the Campbells $2.6 million as a compensatory award and $145 million as a punitive award.[130] The trial court reduced both to $1 million and $25 million, respectively, but the Utah Supreme Court

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[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] Slusher v. Ospital, 777 P.2d 437, 438 (Utah 1989).
[127] *State Farm,* 538 U.S. at 414.
[128] *Id.*
[129] *Id.* at 414-15.
[130] *Id.* at 415.

reinstated the $145 million punitive award.[131]

The Supreme Court reversed that decision.[132] In the majority opinion, Justice Kennedy, citing Justice Breyer's *BMW* concurrence, held that a punitive award could violate due process if it imposed "grossly excessive or arbitrary punishments on a tortfeasor."[133] The constitutional concern at issue was "the imprecise manner in which punitive damages systems are administered,"[134] a clear statement of the Court's turn from fair notice to non-arbitrariness. The Court went on:

> We have admonished that "punitive damages pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts" . . . . "The Due Process Clause does not permit a State to classify arbitrariness as a virtue. Indeed, the point of due process — of the law in general — is to allow citizens to order their behavior."[135]

Although fair notice was on the minds of the *State Farm* majority, it was only fair notice as a product of non-arbitrariness.

However, the two second-level aspects of *BMW* discussed earlier — the primacy of reprehensibility and the futility of establishing bright mathematical lines — posed difficulties for the newly clarified rationale. Regarding the primacy of

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[131] *See* Campbell v. State Farm Mut. Auto. Ins. Co., 65 P.3d 1134, 1152 (Utah 2001).
[132] *State Farm*, 538 U.S. at 418.
[133] *Id.* at 416.
[134] *Id.* at 417.
[135] *Id.* at 417-18 (quoting Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994) and *Haslip*, 499 U.S. at 59 (O'Connor, J., dissenting)).

reprehensibility, *State Farm* made this point also when, quoting from Justice Breyer's *BMW* concurrence, it stated: " '[a defendant's wealth] cannot make up for the failure of other factors, such as 'reprehensibility,' to constrain significantly an award that purports to punish a defendant's conduct.' "[136] In this regard, "reprehensibility" can be a troubling guidepost with respect to arbitrariness *vel non* because it often provides little or no guidance at all. As for "bright lines," such mathematical tests, whatever their demerits on other grounds may be, are among the most obvious ways to constrain arbitrariness.

Despite its tension with non-arbitrariness, *State Farm* did not formally break with either second-level aspect. The opinion reiterated that reprehensibility was the " 'most important indicium' " of a punitive award's reasonableness.[137] Similarly, the majority again declined to "impose a bright-line ratio which a punitive damages award cannot exceed."[138]

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[136] *Id.* at 428 (quoting *BMW*, 517 U.S. at 591 (Breyer, J., concurring)).

[137] *State Farm*, 538 U.S. at 419 (quoting *BMW*, 517 U.S. at 575). The Court noted: "While we do not suggest there was error in awarding punitive damages based upon State Farm's conduct toward the Campbells, a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further." *Id.* at 419-20. Particularly problematic was the jury's knowledge of and reliance on State Farm's out-of-state practices in assessing punitive damages. *Id.* at 420-21. Not only had some of that out-of-state conduct been lawful where it occurred, but, noting the possibility of multiple recoveries, *State Farm* also held due process did not permit punishment of a defendant based on hypothetical claims. *Id.* at 423. *See BMW*, 517 U.S. at 572.

[138] *State Farm*, 538 U.S. at 425.

Yet *State Farm* left little doubt that at least one of these issues was to be significantly reshaped. Immediately after rejecting a "bright-line ratio," the majority stated:

> Our jurisprudence and the principles it has now established demonstrate . . . that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. . . . The [BMW] Court . . . referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, or, in this case, of 145 to 1.[139]

Thus, *State Farm* not only established that a numerical test could be used in respect of a ratio's reasonableness *vel non*, it established a mathematical line for the entire excessiveness decision that courts would have to justify crossing.

In doing so, *State Farm* appeared to significantly change the way in which lower courts were to deal with ratios. Not only did the opinion place the presumptive cap on ratios at 9 to 1, it went on to specifically describe cases in which deviation from the single-digit rule would be appropriate: those cases where " 'a particularly egregious act has resulted in only a small amount of

[139] *Id.* (internal citations omitted).

economic damages' " or where " 'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.' "[140] Noticeably, these were exactly the situations offered for variation by *BMW*. But coupled with the single-digit presumption established by *State Farm*, these situations had arguably become exceptions to the rule, rather than evidence that no rule could possibly exist. In fact, the 9 to 1 "bright line" provided such solid footing for defendants to contend that higher ratios violate due process that Justice Ginsburg's *State Farm* dissent challenged the "numerical controls" as "boldly out of order."[141] *State Farm*'s take on the primacy of reprehensibility was cloudier. As noted, *State Farm* continued to recognize reprehensibility as " '[t]he most important indicium of the reasonableness of a punitive damages award.' "[142] Indeed, the majority devoted a sizable portion of the opinion to discussion of why the evidence provided below did not show particularly reprehensible conduct,[143] and why the evidence that did was beyond the scope of the Campbells' trial.[144] Undoubtedly, reprehensibility remained important to the analysis.

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[140] *Id.* (quoting *BMW*, 517 U.S. at 582).
[141] *Id.* at 438 (Ginsburg, J., dissenting).
[142] *Id.* at 419 (quoting *BMW*, 517 U.S. at 582).
[143] *State Farm*, 538 U.S. at 419-20.

> [W]e must acknowledge that State Farm's handling of the claims against the Campbells merits no praise. . . . While we do not suggest there was error in awarding punitive damages based upon State Farm's conduct toward the Campbells, a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives . . . .

[144] *Id.* at 422.

Yet, in an important way, *State Farm* subordinated reprehensibility to ratio. No matter how egregious the defendant's act, *State Farm* established a presumptive 9 to 1 limit with respect to a ratio's reasonableness.[145] Moreover, *State Farm* equated this presumptive cap on a ratio's reasonableness with a general cap on an award's excessiveness. In this way, the decision made ratio the initial consideration in any excessiveness analysis, one whose qualifications appear specific and enumerated. Reprehensibility could overcome the presumption " 'where a particularly egregious act has resulted in only a small amount of economic damages.' "[146] But no matter how egregious the act, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."[147] After *State Farm*, ratio seemed to be in the driver's seat, and, while it remained the "most important indicium" in name, reprehensibility's effect on excessiveness analysis appeared severely constrained.

Post-State Farm Cases

The question remaining after *State Farm*, though, was

> For a more fundamental reason, however, the Utah courts erred in relying upon [State Farm's similar out-of-state conduct] and other evidence: The courts awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm. A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.

[145] *Id.* at 425.
[146] *Id.* (quoting *BMW*, 517 U.S. at 582).
[147] *Id.*

whether the Court's reluctance to formally and forcefully depart from the qualifications to the ratio guidepost might cause, or at least allow, lower courts to disregard the shift in rationale and continue to generally disregard the ratio guidepost. The short-term and mostly anecdotal answer is that lower courts have adapted surprisingly well to the muddled state of affairs left by *State Farm*. These courts are vigorously using the ratio guidepost to constrain punitive damage awards, in line with a concern for non-arbitrariness.

Take, for example, *McClain v. Metabolife International Inc.*,[148] in which a number of plaintiffs were awarded compensatory awards and punitive awards arising from the defendant's sale of diet pills. One of the seven plaintiff's punitive award ratio exceeded 9 to 1.[149] The district court first noted it had "hoped that *State Farm* would provide help for ruling on [defendant]'s claim that the punitive damages imposed in these cases are excessive. Now the court is not sure that the wait was worth it."[150] Still, *McClain* observed that "*State Farm* begins to provide real help" when discussing ratios and the presumptive 9 to 1 limit.[151] Based solely on that presumptive limit, *McClain* limited those awards whose ratios exceeded 9 to 1 to that ratio and left alone all other

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[148] 259 F. Supp. 2d 1225 (N.D. Ala. 2003).

[149] *Id.* at 1231. *McClain* did not decide whether another plaintiff's ratio was 7.5 to 1 or 75,000 to a nominal amount, instead holding, pursuant to *State Farm*, that even in the latter case, the punitive award would have been justified because of the miniscule nature of the compensatory award. *Id.* at 1235.

[150] *Id.* at 1228-29.

[151] *Id.* at 1230. *See id.* at 1231 (describing *State Farm's* ratio analysis as "the most potent ingredient in the witch's brew").

punitive awards whose ratios were below 9 to 1.[152]

Ratio as a constraint on jury caprice was clearly on the mind of the district court in *Eden Electrical, Ltd. v. Amana Co., L.P.*, in which the ratio for a purely economic injury was 8.5 to 1.[153] The court began by observing, "after [*BMW*] and *State Farm*, the [punitive damage] award probably cannot exceed a 10-to-1 ratio."[154] It explained:

> Specifically, this Court reads *State Farm* to mean that even where all the reprehensible considerations are present, but where compensatory damages are significant, the punitive damages award cannot ordinarily exceed the 10-to-1 ratio and still be constitutional. Thus, even where a plaintiff has suffered a physical harm as a result of a recidivist defendant's intentional and malicious disregard for the health and safety of others, and the defendant targeted his victim because the victim was financially vulnerable, still that plaintiff's punitive damages award could probably not constitutionally exceed the 10-to-1 ratio. When the Court compares the punitive damages award in the instant case (an economic harm case) to this hypothetical case, surely it must conclude that the Plaintiff's 8.5-to-1 ratio award is constitutionally excessive.[155]

Obviously, ratio is the most important indicium of excessiveness under *Eden Electrical*'s analysis. No matter the reprehensibility, ratio controls so long as the compensatory award was substantial enough to make ratio meaningful in the first place.

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[152] *Id.* at 1235.
[153] 258 F. Supp. 2d 958, 974 (N.D. Iowa 2003).
[154] *Id.* at 973.
[155] *Id.* at 974.

Even courts that question the perspicacity of *State Farm* have recognized its instruction that ratios are supposed to play a greater role in excessiveness analyses than they had previously. In *TVT Records v. Island Def Jam Music Group*,[156] the court was presented with a number of punitive damage awards, each of which had a ratio below 9 to 1.[157] The opinion was careful to tread lightly on the ground tilled by *State Farm*, noting "the Supreme Court's instructions on [the ratio] point still appear somewhat imprecise" and that "these [ratio] guidelines are far from firm and crystal-clear, and may be read by adverse litigants to accommodate their diametric propositions."[158] The court continued, stating:

> It is not the task of this Court to reconcile the extremes that still formative Supreme Court guidance conceivably might accommodate . . . . It suffices to say that whatever vagueness and tensions *State Farm* seems to reflect, to this Court the ruling's higher frequencies are quite audible; the notes resonate loud and clear concerns signaling that, at least under the circumstances the case at hand presents, the damages awards that prevail should register at the lower end of the scale.[159]

The court concluded that because the compensatory awards reflected "complete compensation," even the sub 9 to1 ratios were unreasonable.[160]

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[156] 279 F. Supp. 2d 413 (S.D.N.Y. 2003).
[157] *Id.* at 449.
[158] *Id.* at 449, 450.
[159] *Id.* at 450.
[160] *Id.* at 450-51 (citing *State Farm*, 538 U.S. at 424).

These cases and others have heeded *State Farm*'s guidance that punitive awards should not exceed nine times the amount of compensatory damages except in certain well-defined cases.[161] The absence of a bright line mathematical rule that had caused earlier courts to simply disregard ratios has been placed back into the context that certain cases of nominal or meager compensatory damages will require larger ratios. Moreover, these cases show that the titular position reprehensibility still holds as the "most important indicium" has been practically disregarded as lower courts move more towards a ratio-based doctrine.

VI. THE ROAD TO SOMEWHERE?

The weakness of the ratio guidepost after *BMW* was obvious after even a cursory review of punitive damage opinions. This weakness was caused by specific second-level provisos in the *BMW* opinion that qualified ratios' applicability to such an extent as to render it meaningless. Largely because of this weakness of ratio, the *BMW* guideposts could truly have been said to mark a road to nowhere. However, that result was not terribly inconsistent with the *BMW* Court's concern for mere fair notice. On the other hand, when the Court shifted its focus from fair notice to non-arbitrariness, those second-level aspects and the weak ratio guidepost they created became problematic. The shift in rationale occurred in *Cooper Industries* and *State Farm*, but it was the latter

[161] *See, e.g.*, Lincoln v. Case, 340 F.3d 283, 293-94 (5th Cir. 2003); Diamond Woodworks, Inc. v. Argonaut Ins. Co., 135 Cal. Rptr. 2d 736, 761-62 (Cal. Ct. App. 2003).

that began to concomitantly change the second-level provisos that had caused ratio's weakness and produced tension with the principle of non-arbitrariness.

However, those second-level changes in *State Farm* were baby steps — for primacy of reprehensibility, any change was entirely implicit. Plainly, the Court has yet to explicitly do that which it has done implicitly: eschew those qualifications for ratios in favor of a more robust ratio guidepost. As a result, *State Farm's* effect on the primacy of reprehensibility and the impossibility of mathematical bright lines, and therefore on the ratio guidepost itself, is very much up for grabs. However, the shift from reprehensibility to ratio and from a reluctance to establish bright numerical lines to a fairly straightforward single-digit test is necessary if the Court is to remain concerned with non-arbitrariness instead of fair notice. Post-*State Farm* courts appear to have gotten the message despite the Court's inability to formally break with or redefine either notion. Only time will tell, but if *State Farm* proves unable to constrain capricious jury awards, it is likely that the analysis that Justice Scalia called the "road to nowhere" and "insusceptible of principled application"[162] will again come before the Court and force a clear choice between reprehensibility and a distrust of bright-line tests on the one hand and ratio and a defined numerical criterion, however nuanced, on the other.

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[162] *State Farm*, 538 U.S. at 429 (Scalia, J., dissenting).